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In The

Supreme Court of the United States

October Term, 1996

STUPAK-THRALL, et al.,

Petitioners,

vs.

UNITED STATES, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF ARIZONA STATE CHAMBER OF COMMERCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, LAKE STATES RESOURCE ALLIANCE, INC., NATIONAL MINING ASSOCIATION AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, *Amici Curiae* Arizona State Chamber of Commerce, National Federation of Independent Business Legal Foundation, Lake States Resource Alliance, Inc., The National Mining Association and Independent Petroleum Association of America (collectively "*Amici*"), respectfully submit the following Brief in Support of Kathy Stupak-Thrall and Michael and Bodil Gajewski's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. Respondents, United States of America and Daniel R. Glickman, Secretary of the Agriculture, by their counsel, Walter Dellinger, Acting Solicitor General, have given consent to *Amici* to submit this Brief. Written consent has been filed with the Clerk of this Court.

The Arizona State Chamber of Commerce ("Chamber") is a non-profit trade association under Section 501(c)(6) of the Internal Revenue Code, 26 U.S.C. § 501(c)(6)(1994), and consists of approximately 400 members which represent Arizona businesses of all types and sizes. The Chamber represents its members on issues of interest to the business community, including environmental and natural resource issues. The Chamber actively participates in the development of environmental statutes and regulations and represents its members in environmental litigation which affects the ability of its members to conduct business in Arizona.

The State of Arizona contains approximately 34 million acres of federally-owned land. Chamber members own, lease or conduct business on private land adjacent

to federal land. Also, many Chamber members have business interests located on federal land. Such interests include oil and gas leases, mining claims, timber, transportation and utility interests, and farming and grazing interests.

The State of Michigan contains 3.5 million acres of federally-owned land. The National Federation of Independent Business ("NFIB"), represents the interests of small and independent businesses nationwide. NFIB has more than one-half million small and independent business members, and in Michigan, NFIB has more than 23,000 business-owner members. The NFIB Legal Foundation is a 501(c)(3) nonprofit charitable organization under Internal Revenue Service regulations. The purpose of NFIB Legal Foundation is to take an active role in assisting NFIB and its members in establishing legal precedents that will provide maximum opportunities for the owners of small independent businesses to meet and enjoy the challenge, freedom and prosperity consistent with a private enterprise market economy. Many NFIB members own, lease or conduct business on private land adjacent to federal land. Some NFIB members have business interests located on federal lands.

Lake States Resource Alliance, Inc. ("LSRA") is an organization whose primary purpose is to provide a forum for individuals, organizations and governmental bodies to promote multiple use of forests and related resources of the Great Lake states in a manner so as to foster healthy, vibrant and productive conditions for all members. Many members of LSRA own property adjacent to federal lands or have interests located on federal land.

The National Mining Association ("NMA") is a trade association representing mining companies that produce most of the Nation's minerals. Its members also include other key segments of the mining industry – manufacturers of mining equipment, resource developers, and transporters of mining products.

The mining industry produces vital resources needed to fuel our economy, including the manufacture of virtually all commodities sold in domestic and foreign markets. Coal is used to generate 56% of the electricity consumed on an annual basis in the United States. Mining companies produced $39 billion worth of nonfuel minerals last year, which in turn were used to manufacture $395 billion worth of products for use by Americans and for export to trading partners around the world. Many members of the NMA own property or interests adjacent to federal lands or have interests located on federal lands.

The Independent Petroleum Association of America ("IPAA") is a national trade association representing approximately 5,500 individuals and non-integrated, independent oil and natural gas producing companies involved in the exploration, development, and production of crude oil and natural gas in the United States. The combined membership of the IPAA and its national, state and regional cooperating associations includes nearly all of the 8,000 independent oil and natural gas exploration and production companies in the United States. Many IPAA members own property or interests adjacent to federal lands or have interests located on federal lands.

The District Court decision in this case, as affirmed by the equally-split Sixth Circuit Court of Appeals, is contrary to this country's concept of federalism and basic notions of constitutional law because the Court held that, by virtue of the Property Clause, federal agencies are granted state police powers to regulate private interests on private lands located near federal land. As private owners of land or interests adjacent to federal property or as holders of business interests on federal lands, each *Amici* is directly threatened by this decision because of the seemingly limitless authority with which a federal agency can now regulate private property.

STATEMENT OF FACTS

The Stupak family has owned property abutting the northern shore of Crooked Lake in the upper peninsula of Michigan since the 1930s. Kathy Stupak-Thrall, one of the petitioners in this case, purchased the property from her father in 1986. In 1981, petitioners Michael and Bodil Gajewski purchased a six-cabin fishing resort, also on the north shore of Crooked Lake.[1] The resort has been operating in that location since 1942.

The United States purchased property surrounding the southern portion of Crooked Lake in 1966 and made that land part of the Ottawa National Forest. The United

[1] Unless otherwise noted, the term "Petitioners" or "Stupak-Thrall" shall hereinafter refer to Kathy Stupak-Thrall and the Gajewskis.

States Forest Service ("Forest Service") assumed administration of that land when it was designated a national forest.

Under Michigan law, a person who owns property adjacent to a lake is a riparian owner[2] and is entitled to use the entire surface of the lake for all riparian uses, including fishing, boating, swimming, sailing and water skiing. *See Hall v. Wantz*, 336 Mich. 112, 117, 57 N.W.2d 462, 464 (1953) and *People v. Hulbert*, 131 Mich. 156, 157, 91 N.W. 211, 212 (1902). In this case, the Petitioners and the federal government are riparian owners under Michigan law and are therefore entitled to use the entire water surface of Crooked Lake.

After Petitioners acquired their property interests, Congress enacted the Michigan Wilderness Act ("MWA") in 1987, which created ten new wilderness areas, including the "Sylvania Wilderness Area." The Sylvania Wilderness Area contains most of Crooked Lake except for the northern-most bay area where private landowners, including Petitioners, hold title to property. Section 5 of the MWA provides the Forest Service with the power to regulate the wilderness areas, including the Sylvania Wilderness, and states:

> Administration of Wilderness Areas – *Subject to valid existing rights*, each wilderness area designated by this Act shall be administered by the Secretary of the Agriculture in accordance with

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[2] One whose land abuts a lake is really a "littoral" owner, not a riparian owner. *See* Black's Law Dictionary 934 (6th Ed. 1990). Nevertheless, the term "riparian" is used throughout this brief to be consistent with the lower court opinions.

> the provisions of the Wilderness Act of 1964 governing areas designated by that Act as wilderness areas. . . .

See Pub. L. No. 100-184, 101 Stat. 1274, 1275 (1987). The Wilderness Act of 1964 also recognizes pre-existing rights and provides that:

> Except as specifically provided for in this Chapter and *subject to existing private rights*, there shall be no commercial enterprise and no permanent road within any wilderness area . . . and, except as necessary, . . . there shall be no . . . used motor vehicles, motorized equipment, motor-boats . . . and no structure or installation within any such area.

See 16 U.S.C. § 1133(c) (1994).

On April 20, 1992, the Forest Service released "Amendment No. 1," a regulation which prohibits the use of sailboats and houseboats within the Sylvania Wilderness, including the surface of Crooked Lake. Despite Congress's clear directive to the Forest Service that it must administer the MWA, including, the Sylvania Wilderness Area, "subject to valid existing rights," the Forest Service ignored that directive by promulgating Amendment No. 1 which has extinguished Petitioners' "valid existing" riparian rights to use the entire surface of Crooked Lake.

STATEMENT OF THE CASE

A. Administrative Decision

Kathy Stupak-Thrall filed an administrative appeal with the Forest Service challenging the promulgation of

Amendment No. 1 on the grounds that the Amendment had not been promulgated subject to her "valid existing riparian rights" and that the Amendment destroyed those rights. She also argued that Amendment No. 1 constitutes a "takings" under the Fifth Amendment to the United States Constitution.[3] The Regional Forester denied the appeal, concluding that the "valid existing rights" language contained in the MWA refers only to privately-held subsurface mineral rights.[4] After accepting discretionary review, the Chief of the Forest Service upheld the Regional Forester's interpretation of the "valid existing rights" language. He also held that even if the riparian rights claimed by Stupak-Thrall were a "valid existing" right, the Forest Service could restrict such rights so long as the restriction did not rise to the level of a "taking."

B. District Court Decision

After exhausting her administrative remedies, Stupak-Thrall filed a complaint in United States District Court, Western District of Michigan, seeking (1) injunctive relief to enjoin the Forest Service from enforcing Amendment No. 1 and from interfering with her riparian rights and (2) damages for an uncompensated regulatory

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[3] The Fifth Amendment provides, in relevant part:

"[n]or shall private property be taken for public use without just compensation." U.S. Const. amend. V.

[4] The Regional Forester also concluded that he could not address the "takings" claim in the context of an administrative appeal.

taking.[5] The Gajewskis filed a complaint in District Court that same day seeking identical relief.

On cross motions for summary judgment, the District Court rejected the Forest Service's construction of the term "valid existing rights" and held that the MWA should be read to make administration of the Sylvania Wilderness Area subject to Petitioners' riparian rights because those rights are "valid existing rights" under the MWA. The District Court nevertheless held that the Forest Service could regulate Petitioners' riparian rights through the Property Clause[6] – a peculiar holding because the Property Clause provides *Congress*, and not the Forest Service, with the powers to regulate property belonging to the *United States*. The District Court concluded that riparian rights are not absolute rights and could be limited by the Forest Service pursuant to Michigan's "reasonable use" doctrine – which provides that one riparian cannot use his rights in a way that unreasonably infringes on other riparians. Without specifying how this *state* law concept is connected with the MWA's "valid existing rights language," the District Court held that the

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[5] The District Court did not address the "takings" claim because the Court earlier had bifurcated that issue from Stupak-Thrall's challenge to Amendment No. 1.

[6] The Property Clause of the United States Constitution provides that "[t]he Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State." U.S. Const., art. IV, § 3, cl. 2.

Forest Service's regulations were valid under the Michigan "reasonable use" doctrine and could be enforced through the "police powers" of governmental units.

C. Sixth Circuit Court of Appeals Decision

Stupak-Thrall and the Gajewskis appealed the District Court's decision to the Court of Appeals for the Sixth Circuit. The Sixth Circuit, relying on this Court's opinion in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), held that the Property Clause provides Congress with the power to regulate both federal and *non-federal* land. The Sixth Circuit then determined that Congress has authorized the Forest Service to regulate the Sylvania Wilderness Area and when the Forest Service "acts to preserve wilderness character under the Wilderness Act, the scope of authority – except to the extent that Congress may expressly limit it – is coextensive with Congress's *own* authority under the Property Clause." *Stupak-Thrall*, 70 F.3d at 888 (emphasis added). Incredibly, the Sixth Circuit then held that the "subject to valid existing rights" language contained in the MWA limits the Forest Service's authority to regulate, only to the extent such authority is limited under *state* law.

Although the Sixth Circuit rejected the District Court's "reasonable use" doctrine analysis, the Sixth Circuit came to the extraordinary conclusion that Amendment No. 1 is a valid exercise by the Forest Service of police power under state law and therefore a valid exercise of police power conferred on the Forest Service by the Property Clause.

D. *En Banc* Decision

After Petitioners filed a timely request for rehearing, the Sixth Circuit vacated its earlier opinion and heard oral argument in the case *en banc* on July 23, 1996. Because the Sixth Circuit failed to reach consensus (the Sixth Circuit was equally divided seven to seven), the District Court's decision was affirmed. A minority concurring opinion incorporated the prior panel decision. However, Judge Boggs authored a thirty-five page dissent, essentially stating that riparian rights under Michigan law are valid property rights protected from restriction by Congress's specific inclusion in the MWA of the "subject to existing valid rights" language.

SUMMARY OF THE ARGUMENT

The Forest Service's promulgation of Amendment No. 1 ignores Congress's directive that the Forest Service administer the Michigan Wilderness Act "subject to valid existing rights." By unilaterally rescinding this unambiguous statutory directive, the Forest Service has effectively extinguished the Petitioners' existing riparian property rights. The regulatory overreaching by the Forest Service in this case constitutes an inappropriate attempt by a federal agency to exercise the sovereign power of a state to extinguish private property interests expressly protected by Congress under the MWA. This dangerous precedent will have far-reaching impacts beyond the shores of Crooked Lake because the phrase "subject to valid existing rights" appears not only in the

MWA, but also in countless legislative enactments which withdraw millions of areas of land for national parks, monuments, wilderness areas and other federal purposes. Scores of private property owners or holders of protected property interests on federal lands have come to expect that valid existing property interests will be protected when Congress has intentionally included this clear and unambiguous language in federal legislation. This Court should therefore grant the Petition for Writ of Certiorari to clarify that a federal agency cannot unilaterally invoke the Property Clause to grant itself state police power to extinguish a private property right that is protected by Congress as a "valid existing right."

The Court also should grant the Petition for Writ of Certiorari because the District Court holding, as affirmed by the equally-split Court of Appeals, directly conflicts with relevant decisions of this Court and other Courts of Appeal. The holding of the District Court, as affirmed by the equally-split Court of Appeals, conflicts with this Court's holding in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the District Court decision defers to an agency's construction of a statute which renders meaningless an unambiguous provision of that statute. The District Court decision also conflicts with other relevant decisions of this Court because the District Court decision construes a statute in a manner so as to raise substantial constitutional issues. Finally, the District Court decision conflicts with decisions of other Courts of Appeal concerning the scope of the phrase "valid existing rights."

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO DECIDE IMPORTANT CONSTITUTIONAL AND STATUTORY QUESTIONS.

A. This Court Should Grant The Petition To Clarify That a Federal Agency Cannot Unilaterally Invoke The Property Clause To Grant Itself State Police Power and Use That Power To Extinguish Private Property Rights That Are Protected By Federal Statute As "Valid Existing Rights."

At the District Court, Petitioners argued that federal agencies cannot invoke the Property Clause as authority to regulate private non-federal lands located adjacent to federal land. Citing *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the District Court rejected that argument and held that the Property Clause provides federal agencies with the authority to reach "beyond the territorial limits" of federal land to regulate private land. *See Stupak-Thrall*, 843 F. Supp. at 332. The District Court then determined that the Forest Service has acquired some type of "police power" under the Property Clause which it can use to regulate non-federal lands.

The Sixth Circuit agreed with the District Court on the scope of federal agency authority under the Property Clause and held that "the general government doubtless has the power over its own property analogous to the

police power of the several states." *Stupak-Thrall*, 70 F.3d at 889 (citing *Kleppe v. New Mexico*, 426 U.S. 529 (1976)). The initial Sixth Circuit panel then took the unsupportable position that federal agencies may exercise their "police power" under the Property Clause in any manner that does not exceed the bounds "of permissible police power regulation under state law." Remarkably, the initial Sixth Circuit panel concluded that because under state law the State of Michigan could impose reasonable regulations upon riparian owners for the benefit of the State, the Forest Service could use such state police powers to regulate non-federal lands and private property rights for the benefit of federal interests, despite the Congressional mandate in the MWA that federal authority be "subject to valid existing rights."

This Court should grant the Petition for Writ of Certiorari to clarify that a federal agency cannot unilaterally invoke the Property Clause to grant itself the police power of a state to extinguish existing private property rights on non-federal lands. Contrary to the District Court's holding, as affirmed by the equally-split Court of Appeals, the federal government does not have general police power of the sort retained by the states. *See United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624, 1633 (1995). Indeed this Court has held that the power of a federal agency is no greater than that which is delegated to it by *Congress. Lyng v. Payne*, 476 U.S. 926 (1986). Furthermore, this Court in *Kleppe* specifically left open the extent, if any, to which the federal government can exercise regulatory authority over private lands under the Property Clause. *See Kleppe*, 426 U.S. at 547.

There is no indication in Section 5 of the MWA that Congress intended to empower the Forest Service with

some type of federal or state police power to modify state law on the use of private property rights. To the contrary, the language "subject to valid existing rights" indicates a Congressional intent that the Forest Service respect state law and private riparian rights which predate the MWA.

The importance of this case cannot be overstated. Under the District Court's decision, a federal agency, such as the Forest Service, could grant itself state police power under the Property Clause to regulate private land and private property rights adjacent to or on federal lands. Such state-based police powers could then be used by federal agencies to extinguish or diminish state-based private property interests whenever a federal agency unilaterally determines that federal interests could be "affected." This extraordinary authority over private property interests and state police powers would, under the District Court's decision, be deemed judicially granted to all federal agencies despite clear and unambiguous Congressional restrictions on federal authority over "valid existing rights" in numerous federal statutes, including the MWA. As a result, this Court should grant the Petition for Writ of Certiorari to clarify that a federal agency cannot unilaterally invoke the Property Clause to grant itself such extraordinary powers.

B. This Court Should Grant The Petition To Settle An Important Statutory Question Concerning The Protection Afforded Petitioners By The Phrase "Valid Existing Rights."

In Michigan, state law reserves to riparian owners the right to use the entire surface of lake waters. *Hall v. Wantz*, 336 Mich. 112, 117, 57 N.W.2d 462, 464 (1953).

Prior to the promulgation of Amendment No. 1, Michigan riparian owners were assured that this private property right was protected under state law. By exercising its police powers, the State (and not federal agencies) determined what laws and regulations were appropriate in governing the use of that valid property right. Now, after Amendment No. 1, the Forest Service has arrogated the state's police power to itself and, in doing so, has ignored Congress's directive that the Forest Service must administer the MWA subject to all "valid existing rights," including valid private rights and valid state rights. Unfortunately, the courts below have assisted the Forest Service in this derogation of valid existing private and state rights by upholding an agency's unilateral decision to ignore unambiguous statutory language which was intended by Congress to preserve state-created property rights and any other valid existing property right which predates the MWA.

This Court should grant the Petition for Writ of Certiorari to settle an important statutory question concerning the protection afforded Petitioners by the phrase "subject to valid existing rights." This phrase appears in the MWA and in countless legislative enactments which have withdrawn lands for national parks, monuments, recreation, conservation areas and other federal purposes. *See, e.g.*, 16 U.S.C. § 21d (establishing Yellowstone National Park); 16 U.S.C. § 431 (establishing national monuments) and 16 U.S.C. § 460v (establishing Flaming Gorge National Recreation Area). Such legislation affects millions of acres of land in the United States and private individuals who hold property interests located on, or adjacent to, those federal lands. These interests include

private water rights based upon state laws and property ownership, as well as the full use and enjoyment of all "valid existing rights" held by private parties including, farmers, cattlemen, miners, oil and gas producers, public utility and transportation interests, etc.

Until this case, these private property owners and interest holders understood that their "valid existing" property rights would not be subject to restriction or infringement by a federal agency when, in the agency's view, the restriction or infringement is necessary to advance an interest related to federal land. This understanding is consistent with opinions of other courts that have looked at the issue in similar contexts. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (rights-of-way are pre-existing easements which constitute "valid existing rights" exempted from non-impairment areas); and *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) (open-to-entry land grants are "valid existing rights").

The decision of the District Court, as affirmed by the equally-split Court of Appeals, will encourage federal agencies to ignore congressional directives to protect "valid existing rights" and will foster continual infringement of state-protected private property rights under the pretense that such infringement is necessary to manage federal lands. Thus, the impact of the District Court's decision extends far beyond the shores of Crooked Lake and has the potential of impacting all private property owners who hold lands adjacent to federal land or persons with interests on federal lands. It is therefore imperative that this Court grant the Petition for Writ of Certiorari to clarify that a federal agency must respect and defer to "valid existing rights" which predate relevant congressional legislation.

II. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE DISTRICT COURT DECISION, AFFIRMED BY THE EQUALLY-SPLIT COURT OF APPEALS, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND DECISIONS BY OTHER COURTS OF APPEALS.

A. The District Court Decision Conflicts With This Court's Holding In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court held that if a statute is clear, the federal agency administering that statute must give effect to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 843. If, however, the statute is silent or ambiguous with respect to the specific issue, the court must determine whether the agency has permissibly constructed the statute. *Id.*

The District Court found that Petitioners' riparian rights do constitute "valid existing rights" under the MWA. *See Stupak-Thrall*, 843 F. Supp. at 333. Nonetheless, the District Court endorsed the Forest Service's infringement of these "valid existing rights." This result directly conflicts with Congress's clear and unequivocal mandate in the MWA that the Forest Service administer the MWA "subject to existing valid rights." It therefore was contrary to the *Chevron* decision for the District Court to have deferred to the Forest Service's construction of the MWA once the District Court determined that the federal regulations must be "subject to" Petitioners' riparian rights.

Deferring to the Forest Service's construction of the MWA also is improper because the District Court decision upheld the construction of the MWA in such a manner as to raise serious constitutional issues. When an "agency interpretation to which [the federal courts] would otherwise defer . . . raises serious constitutional questions," deference to the agency is inappropriate. *Miller v. Johnson*, 115 S. Ct. 2475, 2491 (1995). Here, the unilateral assumption of state police power by a federal agency to independently define and regulate state-created property rights raises serious constitutional issues and is clearly contrary to Congress's intent under the MWA. If Congress had intended for the Courts to construe the MWA in this manner, it would not have expressly subjected federal authority under the MWA to "valid existing rights." Any construction of the MWA that effectively deletes or ignores such Congressional restrictions on federal authority is contrary to the intent of Congress and creates significant constitutional problems. Thus, this Court should grant the Petition because the decision of the District Court directly conflicts with relevant decisions of this Court.

B. This Court Should Grant The Petition Because The District Court Decided An Important Federal Question In A Manner That Conflicts With The Decision Of Other Courts Of Appeal.

The District Court determined that Petitioners' riparian rights constitute "valid existing rights" under the MWA. Despite Congress's clear mandate that the Forest Service regulate "subject to" these valid existing rights,

the District Court held that Petitioners' rights were subordinate to the Forest Service regulations. This decision by the District Court, affirmed by the equally-split Sixth Circuit, directly conflicts with the construction given to the phrase "subject to valid existing rights" by other Courts of Appeal. Other Circuit Courts of Appeal have consistently found that a variety of property interests constitute "valid existing rights" as that phrase is used in federal legislation. *See, e.g., Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (rights-of-way are pre-existing easements which constitute "valid existing rights" exempted from non-impairment areas); and *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335 (9th Cir. 1990) (open-to-entry land grants are "valid existing rights"). Indeed, even the *Sixth* Circuit Court of Appeals in *Belville Mining v. United States*, 999 F.2d 989 (6th Cir. 1993), determined that the "valid existing rights" language in the Surface Mining Control and Reclamation Act protected certain state-created rights.

The District Court decision, as affirmed by the equally-split Sixth Circuit Court of Appeals, is in direct conflict with these cases because the District Court determined that the federal administration of the Sylvania Wilderness Area is not "subject to" Petitioners' pre-existing state riparian rights. In contrast, other Circuit Courts of Appeal have interpreted the phrase "subject to valid existing rights" to mean that the federal government must recognize rights, including state property rights, which predate the federal government's interest. As Judge Boggs suggested in his dissent in the *en banc* opinion, the "subject to valid existing rights" language in the MWA was intended to provide superior protection to

existing property rights and to continue a party's entitlement to those rights after enactment of the legislation. *See Stupak-Thrall*, 89 F.3d at 1285. Accordingly, this Court should grant the Petition for Writ of Certiorari to resolve a conflict among the Circuits as to the meaning of the phrase "subject to valid existing rights."

V. CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to prevent the Forest Service from exceeding its authority under the MWA to manage the Sylvania Wilderness Area "subject to the valid existing rights" of the Petitioners.

Respectfully submitted,

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